standard for section 310(b)(4).[78]

Fifth, the March 29 bill replaced USTR with the FCC as the government body that would determine whether the snapback provision would be triggered by a failure of reciprocity.

The full Senate passed S. 652 by a vote of 81 to 18 on June 15, 1995.[79] The version of proposed section 310(f) had changed significantly since the March 29 bill and in its entirety now read:

78. The committee report also misstated the existing law relating to section 310(b)(4): "Existing section 310(b) of the 1934 Act provides in relevant part . . . that an alien *may not own more than 25%* of any corporation that directly or indirectly owns or controls any corporation to which a common carrier license is granted." *Id.* at 33 (emphasis added). As chapter 3 documented, this misinterpretation of section 310(b)(4) correctly summarizes the FCC's reading of the statute; but the agency's version of section 310(b)(4) is not what the plain language of the statute says. Ironically, the House committee report accompanying H.R. 1555 chastised the FCC for this misinterpretation of the statute. H.R. REP. NO. 204, 104th Cong., 1st Sess. 120–21 (1995).

79. 141 CONG. REC. D737 (daily ed. June 15, 1995). Democrats voted for the bill 30 to 16, and Republicans voted for it 51 to 2.

(f) TERMINATION OF FOREIGN OWNERSHIP RESTRICTIONS.—

(1) RESTRICTION NOT TO APPLY WHERE RECIPROCITY FOUND. Subsection (b) shall not apply to any common carrier license held, or for which application is made, after the date of enactment of the Telecommunications Act of 1995 with respect to any alien (or representative thereof), corporation, or foreign government (or representative thereof) if the Commission determines that the foreign country of which such alien is a citizen, in which such corporation is organized, or in which such foreign government is in control provides equivalent market opportunities for common carriers to citizens of the United States (or their representatives), corporations organized in the United States, and the United States Government (or its representative): *Provided*, That the President does not object within 15 days of such determination. If the President objects to a determination, the President shall, immediately upon such objection, submit to Congress a written report (in unclassified form, but with a classified annex if necessary) that sets forth a detailed explanation of the findings made and factors considered in objecting to the determination. The determination of whether market opportunities are equivalent shall be made on a market segment specific basis within 180 days after the application is filed. While determining whether such opportunities are equivalent on that basis, the Commission shall also conduct an evaluation of opportunities for access to all segments of the telecommunications market of

> the applicant.
>
> (2) SNAPBACK FOR RECIPROCITY FAILURE. If the Commission determines that any foreign country with respect to which it has made a determination under paragraph (1) ceases to meet the requirements for that determination, then—
>
> (A) subsection (b) shall apply with respect to such aliens, corporations, and government (or their representatives) on the date on which the Commission publishes notice of its determination under this paragraph, and
>
> (B) any license held, or application filed, which could not be held or granted under subsection (b) shall be withdrawn, or denied, as the case may be, by the Commission under the provisions of subsection (b).[80]

The new version modified proposed section 310(f)(1) in three respects. First, it introduced the President's power to "object" to a market-opportunities determination by the FCC, although the new text only implied silently that the President's objection would trump the FCC's determination. Second, it specified that the FCC's market-opportunities determination must be made within 180 days after an application has been filed. Third, it added the provision that "the Commission *shall* also conduct an evaluation of opportunities for access to *all* segments of the telecommunications market of the applicant."[81] This last change would substantially increase the factual and economic complexity of an FCC proceeding to determine whether to allow foreign ownership exceeding 25 percent. In

80. S. 652, § 105(a), 104th Cong., 1st Sess. (1995) (proposed 47 U.S.C. § 310(f)).

81. *Id.* (emphasis added).

addition to modifying proposed section 310(f), the bill that passed the Senate also clarified that this amendment of section 310(b) would not implicitly amend or repeal the applicability of the Exon-Florio Amendment to a telecommunications transaction.[82]

THE HOUSE BILL

On May 3, 1995, Representative Thomas J. Bliley, Jr., chairman of the House Commerce Committee, introduced H.R. 1555, the "Communications Act of 1995."[83] His cosponsors included Representatives John Dingell, the ranking Democrat on the Committee, and Jack M. Fields, Jr., the chairman of the Subcommittee on Telecommunications and Finance. As introduced, the bill did not address foreign ownership restrictions.

On May 20, 1995, the Subcommittee reported the text of H.R. 1555. By this time, the Subcommittee had incorporated into H.R. 1555[84] a separate bill previously introduced by two of its members, Representatives Oxley and Boucher, that would simply repeal section 310(b).[85] In addition, H.R. 1555 amended section 310(a) to allow the FCC to license foreign governments to operate mobile earth stations for satellite news gathering.[86]

The Oxley Amendment

In markup on May 25, 1995, the foreign ownership provisions

82. "Nothing in this section (47 U.S.C. 310) shall limit in any way the application of the Exon-Florio law (50 U.S.C. App. 2170) to any transaction." *Id.* § 105(c).

83. H.R. 1555, 104th Cong., 1st Sess. (1995).

84. *Id.* § 302(a).

85. H.R. 514, 104th Cong., 1st Sess. (1995).

86. H.R. 1555, § 302(b), 104th Cong., 1st Sess. (1995).

in H.R. 1555 changed entirely. Recognizing after discussions with the White House that his proposal to repeal section 310(b) would fail, Representative Oxley instead offered an amendment, which passed. The Oxley Amendment consisted of two parts. The first part was the provision, already contained in H.R. 1555, exempting foreign governments from section 310(a) for purposes of news gathering by satellite.[87]

The second, and more important, part of the Oxley Amendment was the House's alternative to the Senate's proposal to amend section 310(b)(4) to impose a bilateral reciprocity test. Like S. 652, the Oxley Amendment would create a new section 310(f). However, the mechanics of Representative Oxley's amendment would be entirely different from its counterpart in S. 652. In its entirety, the Oxley Amendment's version of section 310(f) would read:

> (f) TERMINATION OF FOREIGN OWNERSHIP RESTRICTIONS.
>
> (1) RESTRICTIONS NOT TO APPLY. Subsection (b) shall not apply to any common carrier license granted, or for which application is

87. *Id.* § 302(a). The provision would amend section 310(a) to read:

> (a) GRANT TO OR HOLDING BY FOREIGN GOVERNMENT OR REPRESENTATIVE. No station license required under title III of this Act shall be granted to or held by any foreign government or any representative thereof. This subsection shall not apply to licenses issued under such terms and conditions as the Commission may prescribe to mobile earth stations engaged in occasional or short-term transmissions via satellite of audio or television program material and auxilliary [*sic*] signals if such transmissions are not intended for direct reception by the general public in the United States.

Id.

made, after the date of enactment of this subsection with respect to any alien (or representative thereof), corporation, or foreign government (or representative thereof) if—

(A) the President determines that the foreign country of which such alien is a citizen, in which such corporation is organized, or in which the foreign government is in control is party to an international agreement which requires the United States to provide national or most-favored-nation treatment in the grant of common carrier licenses; or

(B) the Commission determines that not applying subsection (b) would serve the public interest.

(2) COMMISSION CONSIDERATIONS. In making its determination, under paragraph (1)(B), the Commission may consider, among other public interest factors, whether effective competitive opportunities are available to United States nationals or corporations in the applicant's home market. In evaluating the public interest, the Commission shall exercise great deference to the President with respect to United States national security, law enforcement requirements, foreign policy, the interpretation of international agreements, and trade policy (as well as direct investment as it relates to international trade policy). Upon receipt of an application that requires a finding under this paragraph, the Commission shall cause notice thereof to be given to the President or any agencies designated by the President to receive such notification.

(3) FURTHER COMMISSION REVIEW. Except as otherwise provided in this paragraph, the Commission may determine that any foreign country with respect to which it has made a determination under paragraph (1) has ceased to meet the requirements for that determination. In making this determination, the Commission shall exercise great deference to the President with respect to United States national security, law enforcement requirements, foreign policy, the interpretation of international agreements, and trade policy (as well as direct investment as it relates to international trade policy). If a determination under this paragraph is made then—

(A) subsection (b) shall apply with respect to such aliens, corporation, and government (or their representatives) on the date that the Commission publishes notice of its determination under this paragraph; and

(B) any license held, or application filed, which could not be held or granted under subsection (b) shall be reviewed by the Commission under the provisions of paragraphs (1)(B) and (2).

(4) OBSERVANCE OF INTERNATIONAL OBLIGATIONS. Paragraph (3) shall not apply to the extent the President determines that it is inconsistent with any international agreement to which the United States is a party.

(5) NOTIFICATION TO CONGRESS. The President and the Commission shall notify the appropriate committees of Congress of any determi-

nations made under paragraph (1), (2), or (3).

Compared to the proposed version of section 310(f) in S. 652, the Oxley Amendment is vastly superior in terms of the incentives that it would create for mutual reduction in barriers to foreign direct investment. In this respect, the Oxley Amendment, which was subsequently improved during floor debate of H.R. 1555, represented a good second-best alternative to repeal of section 310(b).

Several points are immediately apparent from examination of section 310(f)(1) in the Oxley Amendment. First, the lifting of foreign ownership restrictions applies only to common carrier licenses; as in S. 652, television and radio broadcast licenses and aeronautical enroute or fixed radio station licenses would not be affected. Second, either the President or the FCC could make the determination that section 310(b) shall not apply. Third, the lifting of the foreign ownership restrictions by the President or FCC encompasses not only section 310(b)(4), but also sections 310(b)(1), 310(b)(2), and 310(b)(3); in other words, the President and the FCC would be empowered to waive restrictions not only on stock ownership, but also on citizenship requirements for officers and directors. Fourth, the lifting of section 310(b) would occur automatically, without need for any additional public interest determination, if the President determined that the investor's country is a party to an agreement (presumably a future multilateral agreement flowing from talks conducted pursuant to the General Agreement on Trade in Services, or GATS) requiring the U.S. to grant common carrier licenses on a national or most-favored-nation basis. Fifth, the FCC would have the discretion—which it now lacks under sections 310(b)(1), 310(b)(2), and 310(b)(3)—*not* to limit foreign investment if it determined that so doing would serve the public interest.

The Oxley Amendment also differs significantly from S. 652 in the nature of the market-access determination that the FCC would make. Section 310(f)(2) in the Oxley Amendment instructs the FCC to examine "effective competitive opportunities" for U.S. nationals or corporations in the foreign investor's "home market." S. 652, in contrast, speaks of "equivalent market opportunities" and does not specifically limit the consideration of such opportunities to those in the foreign investor's home market. The committee report elaborated on the meaning of "effective competitive opportunities":

> It is the Committee's intent that by applying a "reciprocity" approach, U.S. markets will be open to foreign investment from another country, to the same extent that country's market is open to U.S. investment. Thus, in making such determinations, it is the Committee's intent that the Commission focus principally on the effective competitive opportunities. In other words, absent the unusual circumstance of a serious national security or law enforcement consideration, if an applicant is otherwise well-qualified, a finding of adequate reciprocity in the relevant country should result in a grant of a license.[88]

The relevance of the Oxley Amendment's specific reference to "home market" will become clearer when we examine the FCC's proposed rule for interpreting section 310(b)(4) shortly.

The Oxley Amendment is more specific than S. 652 in stating that the FCC shall "exercise great deference" to the President on "United States national security, law enforcement requirements, foreign policy, the interpretation of international agreements, and trade policy (as well as direct investment as [redacted]

FCC's proposed rule will show, this language can be seen as a rebuke of the FCC's attempt to expand its role in matters concerning international trade and foreign affairs.

Perhaps the most beneficial difference between the Oxley Amendment and S. 652 is that the former avoids the ill-conceived "snapback for reciprocity failure." Section 310(f)(3) of the Oxley Amendment empowers the FCC to make a determination that a country has "ceased to meet the requirements" for the lifting of the foreign investment restrictions in section 310(b). According to the committee report, the FCC would rarely find it justified to resort to this power:

> The Committee anticipates that this provision would be utilized only where the policies and practices of a foreign country are egregious and would result in significant harm to U.S. companies, *e.g.*, where national security and law enforcement concerns would require such action.[89]

Rather than provide that any license held by the foreign entity shall be "shall be withdrawn . . . or denied" by the FCC, as S. 652 provides in its section 310(f)(2)(B), the Oxley Amendment provides only that such license "shall be reviewed by the Commission." In other words, loss of the license is not automatic; the Oxley Amendment would thus permit the FCC to pursue the more sensible remedy of ordering the foreign investor, in the case of section 310(b)(4), to reduce its holdings to 25 percent. Section 310(f)(4) of the Oxley Amendment, however, provides that the FCC shall not have the power to make such a determination "to the extent the President determines that it is inconsistent with any international agreement to which the United States is a party."

89. *Id.* at 122.

Floor Debate and House Passage

The full House passed H.R. 1555 by a vote of 305 to 117 on August 4, 1995.[90] On the House floor, members approved several changes to the Oxley Amendment that would make the provision even more hospitable to foreign direct investment. Representative Bliley, chairman of the House Commerce Committee, offered these changes in the floor manager's amendment and was joined by Representative Dingell and by Representative Henry Hyde, chairman of the House Judiciary Committee.[91]

The first change that the floor manager's amendment made to the Oxley Amendment broadened the scope of proposed section 310(f)(1) so that its exemption of foreign investment from section 310(b)(4) would apply not only to any common carrier license "granted, or for which application is made, after the date of enactment of this subsection," but also to any common carrier license "held" after that date.[92] This change would ensure that any existing foreign investor in a U.S. radio common carrier could use section 310(f)(1) to request the President or FCC to permit him to raise his level of investment in the U.S. carrier without regard to the benchmarks in section 310(b) or the public interest showing that the FCC previously has required of a foreign investor and U.S. radio licensee seeking approval of investment exceeding the 25 percent benchmark in section 310(b)(4).

The floor manager's second change rewrote subsection 310(f)(1)(A) to clarify that the President's grant of authority for higher levels of foreign investment would not compromise national security or law enforcement. The change divided section 310(f)(1)(A) into two conjunctive elements and re-

90. 141 CONG. REC. H8506–07 (daily ed. Aug. 4, 1995).

91. *Id.* at H8444, H8451. The floor manager's amendment passed by a vote of 256 to 149. *Id.* at H8459.

92. *Id.* at H8449.

quired, in new section 310(f)(1)(A)(ii), that the President determine "that not applying subsection [310](b) would be consistent with national security and effective law enforcement."[93]

The third change clarified that the FCC would determine, under section 310(f)(1)(B), whether *not* applying section 310(b) to a foreign investment would serve the public interest:

> (2) COMMISSION CONSIDERATIONS. In making its determination under paragraph (1), the Commission shall abide by any decision of the President whether application of section (b) is in the public interest due to national security, law enforcement, foreign policy or trade (including direct investment as it relates to international trade policy) concerns, or due to the interpretation of international agreements. In the absence of a decision by the President, the Commission may consider, among other public interest factors, whether effective competitive opportunities are available to United States nationals or corporations in the applicant's home market. Upon receipt of an application that requires a determination under this paragraph, the Commission shall cause notice of the application to be given to the President or any agencies designated by the President to receive such notification. The Commission shall not make a determination under paragraph earlier than 30 days after the end of the pleading cycle or later than 180 days after the end of the pleading cycle.[94]

93. *Id.*
94. *Id.*

The effect of this substitute language is to increase significantly, and to make more precise, the role of the President or his designee (most likely, the U.S. Trade Representative) in scrutinizing foreign direct investment that would exceed the benchmarks in section 310(b). Gone is the language directing the FCC to "exercise great deference to the President" on matters of national security, foreign policy, and the like. The new language commands the FCC not to defer, but to obey: "the Commission *shall abide by* any decision of the President" on such matters.[95]

In the absence of a presidential decision on the proposed investment, the FCC is allowed to consider "among other public interest factors, whether effective competitive opportunities are available to United States nationals or corporations in the applicant's home market."[96] But what "other public interest factors" are now permissible for the FCC to consider? The clear implication of the floor manager's language is that the FCC is *precluded from considering* those factors described in the original language of the Oxley Amendment that the floor amendment struck. In other words, the FCC is not to consider "United States national security, law enforcement requirements, foreign policy, the interpretation of international agreements, and trade policy (as well as direct investment as it relates to international trade policy)." Instead, the House directs the FCC to defer *entirely* to the President on such matters and not to undertake its own independent evaluation of them.

As in the original Oxley Amendment, the FCC shall notify the President of any application that it receives requesting an exemption from section 310(b). But unlike the Oxley Amendment, the floor manager's substitute language ensures that the President will have the opportunity to preempt any

95. *Id.* (emphasis added).
96. *Id.*

FCC decision on such an application. The FCC is forbidden to make a determination until 30 days after the end of the pleading cycle—during which time, obviously, the President may issue his own determination and thus moot the FCC's consideration of the application.[97] In addition, the floor manager's substitute adds that the FCC must make its determination within six months of the filing of the last round of pleadings.[98]

The floor manager's fourth change rewrote the process by which the FCC may review whether the foreign investment in question should subsequently be subjected to section 310(b) because of changed circumstances:

> (3) FURTHER COMMISSION REVIEW. The Commission may determine that, due to changed circumstances relating to United States national security or law enforcement, a prior determination under paragraph (1) ought to be reversed or altered. In making this determination, the Commission shall accord great deference to any recommendation of the President with respect to United States national security or law enforcement. If a determination under this paragraph is made then—
>
> > (A) subsection (b) shall apply with respect to such aliens, corporation, government (or their representatives) on the date that the Commission publishes notice of its determination under this paragraph; and
> >
> > (B) any license held, or application filed, which could not be held or

97. *Id.*
98. *Id.*

> granted under subsection (b) shall be reviewed by the Commission under the provisions of paragraphs (1)(B) and (2).[99]

Compared to the original Oxley Amendment, this language greatly reduces the discretion of the FCC subsequently to rescind the authorization given a foreign investor to exceed the benchmarks in section 310(b). The FCC may base its determination only on "changed circumstances relating to United States national security or law enforcement." This language differs completely from the Oxley Amendment, which based the FCC's review on a "foreign country . . . [having] ceased to meet the requirements for [the earlier] determination" that one of its citizens should be allowed to invest in a U.S. radio licensee in excess of the benchmarks in section 310(b). In other words, the FCC's review is confined to national security and law enforcement considerations, not international trade policy concerning foreign direct investment. This conclusion finds further support in the fact that floor manager's substitute language deleted the Oxley Amendment's clarification that, in making a determination under this review process, the FCC "shall exercise great deference to the President with respect to . . . foreign policy, the interpretation of international agreements, and trade policy (as well as direct investment as it relates to international trade policy)." Under the floor manager's substitute, there is no need to instruct the FCC to defer to the President on such matters for the simple reason that the FCC is not authorized to consider them in the first place when making a review determination.

It is noteworthy, because it will surely be cause for future controversy and litigation, that no congressional debate or committee report language explains the insertion of "law

99. *Id.* at H8449–50.

enforcement" as a factor justifying FCC consideration. Perhaps Congress was concerned about wealthy foreign drug lords acquiring control over sophisticated means of radio communications in the U.S.

The floor manager's fifth change was to delete, because it was no longer relevant, the requirement in the Oxley Amendment that the provision authorizing the FCC to undertake a subsequent review of a particular foreign investment "shall not apply to the extent the President determines that it is inconsistent with any international agreement to which the United States is a party." Because the floor manager's substitute authorized the FCC subsequently to review a foreign investment only on national security or law enforcement grounds, the agency would never be in the position of making potentially embarrassing pronouncements about international trade policy of the sort that the deleted provision in the Oxley Amendment was obviously intended to prevent.

Sixth, the floor manager's substitute created a new section 310(f)(5), an important provision concerning appeal:

> (5) MISCELLANEOUS. Any Presidential decisions made under the provisions of this subsection shall not be subject to judicial review.[100]

Any final decision by the FCC under proposed section 310(f) would be appealable to the U.S. Court of Appeals for the D.C. Circuit under section 402(b) of the Communications Act.[101] In any FCC matter, the prospect of appeal raises the likelihood of remand to the agency and, consequently, a protracted administrative process. The inability of losing parties (such as competitors of the U.S. radio licensee receiving the

100. *Id.* at H8450.
101. 47 U.S.C. § 402(b).

foreign direct investment) to appeal a presidential determination would greatly expedite the process by which a major foreign investor could begin operations in the U.S. For this reason, a foreign investor would vastly prefer the President, rather the FCC, to make the determination that the proposed investment should be allowed to exceed the benchmarks of section 310(b).

The seventh and final change that the floor manager made to the Oxley Amendment was to specify: "The amendments made by this section shall not apply to any proceeding commenced before the date of enactment of this Act."[102] In practical effect, this provision would appear to exclude the investment in Sprint by France Télécom and Deutsche Telekom from the liberalized standards that section 310(f) would establish.

During floor debate on H.R. 1555 on August 4, 1995, Representative Oxley expressed "firm support" for the floor manager's amendment, noting that it made "some important refinements regarding foreign ownership."[103] Oxley's principal point was "to clarify the committee report language . . . concerning how the [Federal Communications] Commission should determine the home market of an applicant."[104] He elaborated:

> It is the committee's intention that in determining the home market of any applicant, the Commission should use the citizenship of the applicant—if the applicant is an individual or partnership—or the country under whose laws a corporate applicant is organized. Furthermore, it is our intent that in order to prevent abuse, if a corporation is controlled by

102. 141 CONG. REC. H8450 (daily ed. Aug. 4, 1995).
103. *Id.* at H8458.
104. *Id.*

> entities—including individuals, other corporations or governments—in another country, the Commission may look beyond where it is organized to such other country.[105]

Representative Oxley concluded his floor remarks by emphasizing that the amendments to section 310(b), including the floor manager's modifications of the Oxley Amendment, "have the support of the administration and the ranking members of the Committee on Commerce."[106] The foreign ownership provisions of H.R. 1555 elicited no further floor debate from any member.

THE FCC'S PROPOSED RECIPROCITY RULE

As debate on amending section 310(b) was beginning in the 104th Congress in 1995, the FCC proposed to exercise its existing authority under the Communications Act to impose a reciprocity test for section 310(b).[107] The agency proposed to incorporate an "effective market access standard" into the public interest determination that it conducts under section 310(b)(4) in situations where foreign ownership would exceed 25 percent.[108]

Under the proposed rule, the FCC would "consider whether the foreign entity's primary markets pass the effective market access test" "when an applicant in whom foreign ownership in the parent holding company exceeds the 25 percent benchmark seeks a common carrier radio license, or when a U.S. licensee seeks to increase the level of foreign ownership

105. *Id.* These remarks reiterated a similar statement made in the committee report. H.R. REP. NO. 204, *supra* note 78, at 122.

106. 141 CONG. REC. H8458 (daily ed. Aug. 4, 1995).

107. *Market Entry and Regulation*, 10 F.C.C. Rcd. at 5257 ¶ 4.

108. *Id.* at 5293 ¶ 92.

in its parent holding company beyond the 25 percent benchmark or previously authorized levels of foreign ownership."[109] The operation of the rule is suggested by the following question posed by the FCC:

> Thus, for example, if a foreign entity seeks to invest in the parent holding company of an applicant for authority to provide Personal Communication Services ("PCS"), should we consider whether U.S. companies can provide PCS, or its functional equivalent, in the foreign entity's primary market?[110]

The question suggests that the FCC would compare regulatory treatment of foreign investment on a service-by-service basis.

The FCC's NPRM is reminiscent of the manner in which the agency has granted waivers under section 310(b)(4). There is always some additional fact that the agency feels free to consider as pertinent to its public interest determination. This added fact becomes the *deus ex machina* that provides a ready escape hatch for any desired outcome:

> We also seek comment on whether . . . we should find that our effective market access finding under Section 310(b)(4) is not dispositive of our decision to license a particular entity. For instance, once we have reviewed the effective market access element of our public interest analysis, should we also assess other public interest factors which might weigh in favor of, or against, allowing entry into the U.S. market? Such factors in this context could

109. *Id.* at 5295 ¶ 95.
110. *Id.* at 5295 ¶ 96.

> include the state of liberalization in the foreign country's other radio-based service markets, national security, or the competitiveness of the applicant's target market in the United States. Finally, we seek comment on whether, if we do consider effective market access, this would be a more tailored and predictable application of Section 310(b)(4) that will assist us in encouraging and recognizing foreign countries' efforts to liberalize their communications market.[111]

111. *Id.* at 5295-96 ¶ 96. The FCC's NPRM also addressed section 214 certification of international carriers. The factors that the agency considered potentially relevant to its effective market access standard are numerous, and they suggest ways in which the FCC could be expected to broaden its assessment of effective market access for purposes of section 310(b)(4):

> We propose to define effective market access as the ability for U.S. carriers, either currently or in the near future, to provide basic, international telecommunications facilities-based services in the primary markets served by the foreign carrier seeking entry . . . . We would consider the following factors none of which would be dispositive, to determine whether effective market access exists: (1) whether U.S. carriers can offer in the foreign country international facilities-based services substantially similar to those the foreign carrier seeks to offer in the United States; (2) whether competitive safeguards exist in the foreign country to protect against anticompetitive and discriminatory practices, including cost allocation rules to prevent cross-subsidization; (3) the availability of published, nondiscriminatory charges, terms and conditions for interconnection to foreign domestic carriers' facilities for termination and origination of international services; (4) timely and nondiscriminatory disclosure of technical information needed to use or interconnect with carriers' facilities; (5) the protection of carrier and customer proprietary information; and (6) whether an independent regulatory body with fair and transparent procedures is established to enforce competitive safeguards.

The FCC also suggested that it would be more inclined, under its bilateral reciprocity model, to allow more than 25 percent foreign ownership in television and radio broadcasters.[112] Again, consistent with agency practice, the FCC appeared willing to allow higher levels of foreign investment in broadcasters so long as the agency could continue to justify any desired result in a given case by selectively imputing significance to facts *extraneous to the level of foreign ownership*: "[E]ven if we incorporate the effective market access standard in our evaluation of broadcast applications, the nature of the case-by-case review conducted under Section 310(b)(4) is such that we retain the discretion to deny particular applications if warranted by the facts of a specific case."[113]

The FCC's proposed rule is problematic for all the reasons that reciprocity rules are. But there is an additional feature of the FCC rule that would make it highly anticompetitive. The agency's examination of market access would not be confined to the home market of the foreign carrier, but rather would encompass its "primary markets." A primary market is defined to be a market "where a carrier has a significant facilities-based presence."[114] Cable & Wireless, for example, is a British company whose home market, the U.K., is completely open to foreign investment and indeed is characterized by extensive direct investment by U.S. telephone and cable television companies. But Cable & Wireless

Id. at 5271 ¶ 40. Again, in a manner that would maximize its discretion, the agency envisions considering these factors on a selective basis: "In considering these indicators to determine whether effective market access exists, we will not necessarily require that each factor be present in order to make a favorable finding, particularly if there is evidence that the market is fully competitive. Rather, we will look to the arguments of the applicant and commenting parties as to the appropriate weight of each factor in a particular market." *Id.*

112. *Id.* at 5296–98 ¶¶ 99–103.

113. *Id.* at 5298 ¶ 102.

114. *Id.* at 5271 ¶ 40.

also has a major interest in the monopoly provider of telephone service in Hong Kong. The FCC's proposed rule would treat Hong Kong as one of Cable & Wireless' "primary markets" and thus could (and presumably would) consider the company to be in violation of section 310(b)(4) if its U.S. holding company held more than 25 percent of an American radio licensee subject to that statute.

The incentives that such a rule would create are doubly perverse. First, the FCC rule would insulate existing U.S. carriers from competition taking the form of entry by established international carriers. It would reduce the likelihood or delay the arrival of a fourth international full-service network that could compete against the three global networks already being formed by AT&T, BT and MCI, and Sprint in conjunction with France Telecom and Deutsche Telekom.

Second, the "primary markets" test would discourage major foreign carriers—such as Cable & Wireless, Telefónica de España, Canada's BCE, and Japan's NTT—from investing in significant foreign markets that currently are closed to competition. In virtually every privatization, however, the government's sale of ownership in the state-owned telephone company includes a statutory monopoly for a limited term of years, during which time the private owner must make significant infrastructure upgrades. The FCC's rule would put the following choice to the world's largest overseas telecommunications firms: Even if your home market is open to U.S. foreign direct investment, if you want to invest more than 25 percent in a U.S. radio common carrier, you must forgo the opportunity to participate in significant privatizations around the world on terms that would include the enjoyment of a temporary statutory monopoly. If foreign carriers chose to invest in high-growth markets (in Asia or Latin America, for example) instead of the U.S., then American consumers would suffer. On the other hand, if foreign carriers invested in the U.S. and consequently declined to invest (or disinvested) in emerging markets elsewhere in the world, the development of a modern global telecommunications infrastructure would be retarded. Even under this second scenario the U.S. would indirectly suffer harm in the sense that American corporations have substantial needs for telecommunications services in foreign countries. Of course, one cynical explanation for the "primary markets" test is that, by putting large foreign carriers to this Hobson's choice, the FCC would increase the likelihood that U.S. telecommunications firms would win the opportunity to invest in foreign privatizations that would confer a temporary monopoly privilege. In other words, it would be perfectly fine for U.S. telecommunications firms to secure the same temporary monopolies in emerging markets that would provide the FCC's rationale for disqualifying foreign carriers from competing in the U.S. market. It is preposterous that a rule having these perverse consequences could be "in the public interest."

Reed Hundt, Chairman of the FCC, strongly supported the FCC's proposed rule and the general principle of bilateral reciprocity in testimony before Congress in May 1995:

> Section 310 is a most powerful lever in opening restricted overseas markets to U.S. investment. *But, it would be a mistake simply to repeal Section 310(b).* Any change should be flexible enough to be market opening, not market closing. The Commission has instituted a proceeding proposing that the public interest standard it uses in determining whether to apply Section 310 take into account the reciprocal openness of the market in the nation from which a potential foreign owner comes. *Any revision of Section 310 should embody this reciprocity principle.*[115]

115. *Hearings on H.R. 1555 Before the Subcomm. on Telecommunications and Finance of the House Commerce Comm.*, 104th Cong., 1st Sess. (May 11, 1995) (statement of Reed E. Hundt, Chairman, Federal Communications

Chairman Hundt reached this assessment despite his concession in congressional testimony in March 1995 that "foreign governments view Section 310 as closing the U.S. market to their companies," that the statute "has become a metaphor for a closed U.S. market," and that he "seldom attend[s] an international gathering or bilateral negotiation without hearing the United States criticized for Section 310."[116] Evidently alluding to Director-General Krenzler's January 1995 letter, Chairman Hundt noted:

> The European Union . . . has recently argued that, since most U.S. carriers use some form of radio facility to supplement their wireline telecommunications facilities, any foreign equity investment will be subject to the restrictions of Section 310. The European Union, therefore, views the U.S. communications market as essentially closed. This dramatically overstates the truth. But it does not dramatically overstate the problem we face.[117]

The problem, in the Chairman's view, was a "negative foreign perception."[118] The controversy, it would seem, stems not from the reality of U.S. policy, but from the failure of Director-General Krenzler to perceive it correctly and comprehend its magnanimity. Chairman Hundt's comment was ironic, for he evidently did not perceive the arrogance with which

Commission) (emphasis added).

116. *Hearings on Section 310 of the Communications Act of 1934 Before the Subcomm. on Commerce, Trade, and Hazardous Materials of the House Commerce Comm.*, 104th Cong., 1st Sess., 1995 FCC LEXIS 1423 (Mar. 3, 1995) (statement of Reed E. Hundt, Chairman, Federal Communications Commission).

117. *Id.*

118. *Id.*

his statement could be taken by Europeans, even though he acknowledged in the same breath that "certain foreign governments have incorporated, or are proposing to incorporate, parallel investment limitations in their own regulatory frameworks."[119]

To the extent that economic analysis has informed the FCC proposal for bilateral reciprocity at all—of which there is no evidence in its notice of proposed rulemaking—Chairman Hundt's reasoning appears to be the following: Unilateral repeal of section 310(b) would constitute a concession to foreign countries that, by sacrificing a bargaining chip, would be less likely than a reciprocity rule to elicit a corresponding reduction in barriers to foreign direct investment abroad. In this respect, unilateral repeal must be dismissed as strategically naïve—not to mention politically unmarketable.

But this reasoning is itself flawed. If the Europeans have an incorrect "foreign perception" now of FCC enforcement of section 310(b), why should we expect their perceptions to be any more astute under a far more complex policy of service-by-service bilateral reciprocity in which the FCC scrutinizes "effective market access" in "primary markets"? Even if the FCC prefers its proposed policy because it appears to be more strategically sophisticated in some game theoretic sense than either the current statute or it outright repeal, it is still necessary to proceed with realistic assumptions about how the strategic responses of other governments may be based on misperception of U.S. law, nationalism, or domestic political pressures. For Chairman Hundt and the FCC to neglect to do so is itself strategically naïve.

THE INEFFICACY OF IMPOSING BILATERAL RECIPROCITY ON SECTION 310(b)

Suppose that, despite all the reasons given in this chapter for

119. *Id.*